NO. 82-5093

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MORRIS ODELL MASON,

Petitioner

v.

EDWARD C. MORRIS,

Respondent

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

1. WAS THE REPRESENTATIONS AFFORDED PETITIONER BY TRIAL COUNSEL WITHIN THE RANGE OF COMPETENCE DEMANDED OF ATTORNEYS IN CRIMINAL CASES?

2. DID THE TRIAL COURT RULE CORRECTLY IN IMPOSING THE BURDEN ON PETITIONER TO ESTABLISH PREJUDICE FROM ERRORS AND OMISSIONS OF COUNSEL?

3. IF PETITIONER DID BEAR THE BURDEN OF ESTABLISHING PREJUDICE BY A PREPONDERENCE OF THE EVIDENCE, DID PETITIONER MEET THAT BURDEN?

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JURISDICTION

The petitioner asserts jurisdiction pursuant to 28 U.S.C. § 1257(3), to review the judgment of the Supreme Court of Virginia of April 20, 1982, denying petitioner's Petition for Appeal.

STATEMENT OF THE CASE

The petitioner is attacking the effectiveness of his counsel only during the sentencing phase of his trial, accordingly the facts will be limited to this portion of petitioner's trial.

References will be to the transcript of the habeas corpus proceeding and in conformity to the designation used by petitioner will be cited as (T. __). References will also be to the transcripts of petitioner's trial and will be designated (T.T. __) followed by date of the transcript and page reference.

Upon being appointed, counsel immediately moved to have petitioner examined. Counsel additionally moved for funds for the appointment of a private psychiatrist. The report of Dr. Dietzgen of May 26, 1978 reports that petitioner was able to stand trial and assist in his own

defense. The report further states that while petitioner was reluctant to go over charges with Dr. Dietzgen, he did explain the meaning of rape and that it was wrong to have sex with an unwilling partner. There is no indication in the report that petitioner denied the crimes. Not satisfied with the report of Dr. Dietzgen, counsel requested a further psychiatric evaluation from Central State Hospital. Dr. Dimitris filed a report dated June 27, 1978, advising that petitioner had undergone psychiatric, psychological, and sociological evaluations and that petitioner's previous hospitalization had been reviewed. This report concluded as follows:

> Petitioner "is not mentally ill (not insane) and is not feeble-minded. He is aware of the charges which are pending against him, the seriousness of the charges, the pending litigation and the possible outcome of a trial. It is our opinion that he is mentally competent and capable of cooperating with his counsel in the preparation of his defense."

This report concluded with a request that information, such as any statement of the petitioner at the time of arrest, information from officers who arrested him and had dealings with him as to his behavior during questioning and while incarcerated, be sent in order to enter an opinion as to petitioner's competence and sanity at the time of the offenses.

This information was forthwith forwarded to Central State and Dr. Dimitris replied by letter dated August 23, 1978, in which he opined that petitioner was aware of the nature, quality and consequences of his acts and furthermore knew his acts were wrong. There is no mention in these reports that petitioner had denied his involvement in the crimes or that there was any indication petitioner might have been suffering from any mental deficiencies at the time of the offenses.

Counsel then filed a motion to suppress petitioner's several confessions. At the suppression hearing petitioner testified that he gave the first statement because he was tired and sleepy and gave the other statements because he had given the first one. (T.T. 9/13/78 pp. 129-131). It is interesting to note that petitioner never claimed that he had not committed the offenses. (T.T. 9/13/78 pp. 126-142). Upon the completion of the testimony the trial court found that petitioner's statements had been voluntarily and intelligently given. (T.T. 9/13/78 p. 143).

The petitioner was then brought to trial where he entered pleas of guilty to the offenses against the advice of his attorneys. (T.T. 9/28/78 p. 11). During the examination by the trial court the petitioner admitted he was entering the pleas of guilty because he was guilty and specifically admitted he had raped Mrs. Hand. (T.T. 9/28/78 pp. 4-5). The petitioner

additionally advised the court that he had had sufficient time to discuss his case with his attorneys including possible defenses. (T.T. 9/28/78 p. 9). The trial court found petitioner's pleas to have been knowingly and voluntarily entered. (T.T. 9/28/78 p. 11).

At the sentencing portion of the bifurcated proceeding counsel presented mitigation that was available to them. Counsel tried to support petitioner's statements that he was under the influence of drugs or alcohol at the time of the offenses. They talked to his girlfriend and mother. They were unable to obtain from petitioner the name of any person who could support this theory and their investigation disclosed none. (T. pp. 70,139). Members of petitioner's family were contacted but refused to assist. (T. pp. 82, 140). The petitioner himself refused to testify even though counsel wanted him to. (T.T. 9/29/78 pp. 21,22). Counsel presented the reports of petitioner's prior hospitalizations at Eastern State, the VA Hospital in Northport, New York, and the VA Hospital in Coatesville, Pennsylvania. (T.T. 9/29/78 pp. 18-22). Counsel felt they "were up against a brick wall." (T. p. 140). Additionally, counsel made an impassioned plea for petitioner's life. (T. 9/29/78 pp. 34-40).

ARGUMENT I

THE TRIAL COURT CORRECTLY RULED THAT PETITIONER HAD RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL TRIAL.

Petitioner asserts that counsel failed to explore, develop and present available evidence of mitigating mental abnormality. The record shows that counsel sought and secured two separate psychiatric examinations. In neither the report of Dr. Dietzgen nor the reports of Dr. Dimitris is there any indication that petitioner was suffering from any mental deficiencies at the time of the offenses. To the contrary, the reports showed that petitioner had undergone psychiatric, psychological and sociological evaluations and had an electroencethalographic examination. The reports found petitioner competent and that he was aware of the nature, quality and consequences of his acts and knew his acts were wrong. Counsel have testified that petitioner had described to them in detail the circumstances surrounding the offenses. (T. pp. 69,138). They found no real inconsistencies between what petitioner had told them and what petitioner had told the police. (T. p. 69). Counsel were unable to develop any evidence to support petitioner's statements that he was under the influence of drugs or alcohol. (T. pp. 70,139). It is important to note that petitioner never gave counsel any indication that he was unaware of what he was doing at the time he committed the offenses and in fact was extremely

explicit in describing the entire episode. (T. p. 77). Counsels' impression was that petitioner knew totally what he was doing from the day of the crimes through the time he was convicted. (T. p. 54).

While counsel did not call Dr. Dimitris to ask about possible mitigation, counsel explained that in view of the record, knowing the statements which had been made and the discussions with the petitioner, and the psychiatric reports, they did not believe Dr. Dimitris or anyone else could be beneficial without some additional evidence which they did not have. (T. pp. 45,77). Counsel testified that the decision not to call Dr. Dimitris was a judgment call made at the time (T. p. 77).

Trial counsel testified that they were fully aware of the provisions of § 19.2-264.4 of the Code of Virginia (1950), as amended, and had discussed this with the petitioner. They tried to elicit petitioner's testimony, but he refused. (T. p. 82). Trial counsel attempted to elicit testimony from family members to no avail (T. p. 82). While counsel recognized that the psychiatric reports did not address mitigating mental abnormalities in those terms, they felt that without additional evidence none of the psychiatrists would be of assistance (T. pp. 82,83).

It is submitted that petitioner's attorneys exercised

reasonable judgment in this case. And even when hindsight reveals a mistake in that judgment, such does not render a lawyer negligent or lacking in competence in rendering his service. Reynolds v. Mabry, 574 F.2d 978 (8th Cir. 1978). In this same vein, the Eighth Circuit said in Robinson v. United States, 448 F.2d 1255, 1256 (1970):

> Hindsight can always be utilized by those not in the fray so as to cast doubt on trial tactics a lawyer has used. Trial counsel's strategy will vary even among the most skilled lawyers. When that judgment exercised turns out to be wrong or even poorly advised, this fact alone cannot support a belated claim of ineffective counsel.

The determination of whether an attorney rendered reasonably effective assistance turns in each case on the totality of facts in the entire record. See Washington v. Estelle, 648 F.2d 276 (5th Cir.), cert. denied, ___U.S.___, 102 S.Ct. 402 (1981).

Petitioner argues that the range of competence must be higher in capital cases because of the qualitative difference between death and other penalties. This argument was rejected by the Virginia Courts, and has been rejected by the Fifth Circuit in Washington v. Watkins, 655 F.2d 1346, 1356 (5th Cir. 1981), cert. denied, ___U.S.___, 102 S.Ct. 2021 (1982). In rejecting the argument that a higher standard of representation must apply in capital cases, the Fifth Circuit stated:

> Innumerable practical problems would be presented by such a holding. For example, since effective assistance is not judged by hindsight, the heightened standard would have to apply to all cases in which a capital offense was charged, regardless of whether the jury subsequently convicted the defendant of a non-capital offense or refused to impose the death penalty in a capital case. Recognition of a "sliding scale" for this constitutional standard would also suggest, for example, that a defendant charged with aggravated assault would be entitled to a more effective lawyer than one charged with simple assault or public intoxication. We decline to embark on such a treacherous path. Id. at 1357, n. 18.

The petitioner refers to Washington v. Strickland, 673 F.2d 879 (1982), rehearing en banc granted, ___F.2d___ (5th Cir. May 14, 1982). When a case is reheard en banc, the panel opinion is stripped of any precedential value. United States v. Michael, 645 F.2d 252, 254 n.2 (5th Cir. 1981) (en banc), cert. denied, ___U.S.___, 102 S.Ct. 489 (1981).

Petitioner also asserts that the evidence presented at the capital sentencing phase of his trial was so meager and so bereft of any development or explanation as to be worthless. Petitioner points out that counsel did not obtain the detailed records of petitioner's prior hospitalizations but only introduced the summaries. Counsel has explained that they felt that the records they had obtained from the hospitals were sufficient and did not believe any further

records would be beneficial. Counsel also explained that they did not subpoena any of the psychiatrists because they felt that the best evidence was in the summaries and did not want to subject the psychiatrists to cross-examination. (T. pp. 71,72). It is strange indeed that petitioner would complain about the lack of the full reports not being introduced when he has completely failed to show in any way how such reports would have been beneficial. Petitioner's present counsel did not see fit to introduce such reports in the habeas hearing, and it must be assumed that they would not have been beneficial in any respect to petitioner. It is also noteworthy that in the habeas proceeding petitioner failed to produce one single piece of evidence to support his claim that he was under the influence of drugs or alcohol at the time of the offenses. Petitioner has also failed to produce any evidence that his family, girlfriend, or anyone else was available to provide mitigation for petitioner.

This case is simply not like the circumstances found in Wood v. Zahradnick, 578 F.2d 980 (4th Cir. 1978). In Wood the court found counsel ineffective for the reason that he completely failed to explore an insanity defense when evidence was known to counsel which indicated such a defense. It is also apparent that Brennan v. Blankenship, 472 F. Supp. 149 (W.D. Va. 1979), furnishes no support to petitioner. In Brennan the court concluded that counsel was ineffective in

failing to follow-up on a psychiatric opinion that the defendant was insane at the time of the crime. In the present case counsel secured two psychiatric reports, obtained records from petitioner's past hospitalizations, attempted to discover evidence to support the theory of alcohol or drugs, and attempted to obtain petitioner's family and others to testify on petitioner's behalf. The actions of counsel in this case are a far cry from the failures of counsel in Wood and Brennan. To characterize counsels' actions as failing to take the minimal steps necessary to explore, develop and prepare a case in mitigation is to ignore the facts.

In determining whether counsel is ineffective the fact that counsel erred is not alone sufficient to establish a denial of the Constitutional right. The Constitution does not guarantee representation which is infallible and an accused assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts. Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978).

The function of a defense attorney is to apply his professional judgment to an infinite variety of decisions in the development and prosecution of a case. Any determination that any given act or omission by counsel amounted to ineffective assistance must be viewed in light of the peculiar facts and

circumstances that influenced counsel's judgment. United States v. DeCoster, 624 F.2d 196, 203 (D.C. Cir. 1979).

Realistically, counsel develops his case in large part from information supplied by the defendant. In United States ex rel Green v. Rundle, 452 F.2d 232, 235 (3rd Cir. 1971), the court indicated that choices based upon such information should not later provide the basis for a claim of ineffectiveness even though that basis would have been undercut by inquiry of others.

> Any "claimed deficiency must fall measurably below accepted standards. To be 'below average' is not enough, for that is self-evidently the case half the time. The standard of shortfall is necessarily subjective, but it cannot be established merely by showing that counsel's acts or omissions deviated from a checklist of standards." United States v. DeCoster, 624 F.2d at 215.

With the factual background of this case in mind it is appropriate to examine other cases which have examined the issue of ineffective assistance of counsel. In Dorsey v. State, 586 S.W.2d 810 (Ct. App. Mo. 1979), the defendant was addicted to drugs and undergoing methadone treatment at the time of his arrest. The defendant claimed that counsel was ineffective for not pursuing this defense. The court held that in the absence of some suggestion of mental instability there was no duty on counsel to initiate an investigation of the mental condition of the accused. It was alleged that counsel was ineffective for failing to consider an insanity

defense in Sanders v. Eyman, 600 F.2d 728 (9th Cir. 1977). The court rejected the claim and found that the record contained evidence that petitioner's post-arrest conduct was not the type that would raise any suspicions of his sanity or capacity. Additionally in Franklin v. United States, 589 F.2d 192 (5th Cir. 1979), cert. denied, 441 U.S. 950 the court rejected a claim that the attorney was ineffective for the failure to move for a competency exam when the record showed that the defendant was alert and coherent.

In this case counsel had reviewed the psychiatric reports and petitioner in his discussions with counsel had not given counsel any reason to suspect that petitioner was suffering from any mental deficiency at the time of the offenses. Ineffective assistance of counsel is to be gauged by the totality of the representation. An accused is not entitled to errorless counsel whose competence or adequacy is to be judged by hindsight. While the hindsight of post-trial counsel may perceive instances wherein trial counsel was not perfect and his strategy was not infallible, that is not the test applied when meeting such complaints. Sanchez v. State, 589 S.W.2d 422 (Cr. App. Tx. 1979); Earvin v. State, 582 S.W.2d 794 (Cr. App. Tx. 1979).

ARGUMENT II

THE TRIAL COURT PROPERLY RULED THAT PETITIONER WAS REQUIRED TO ESTABLISH PREJUDICE FROM ANY ACT OR OMISSIONS OF COUNSEL.

The petitioner maintains that the trial court committed error when it imposed upon him the burden of establishing prejudice from any act or omission of counsel. In support of his argument petitioner principally cites Holloway v. Arkansas, 435 U.S. 475 (1978); Gedders v. United States, 425 U.S. 80 (1976), and Herring v. New York, 422 U.S. 853 (1975). These cases are readily distinguishable from cases involving claims of ineffective assistance of counsel and provide no basis for petitioner's argument that he does not have to show prejudice.

Gedders was not based upon ineffectiveness but upon a Court ruling that prevented the accused from having actual assistance of counsel during a critical stage of his trial. Holloway, involved joint representation of multiple clients with conflicting interest, and in Herring a State statute gave the trial judge in a non-jury trial the power to deny defense counsel's closing summation. For a more exhaustive analysis of why these cases do not support petitioner's argument, See United States v. DeCoster, 624 F.2d 196, 201-202, 234-238 (D.C. Cir. 1979).

The rationale behind DeCoster is soundly based upon the very nature of collateral relief. In United States v. Frady, ___U.S.___, 102 S.Ct. 1584, 1593 (1982), this Court explained why in federal collateral proceedings the defendant must bear a greater burden of proof entirely:

> "By adopting the same standard of review for §2255 motions as would be applied on direct appeal, the Court of Appeals accorded no significance whatever to the existence of a final judgment perfected by appeal. Once the defendant's chance to appeal has been waived or exhausted, however, we are entitled to presume he stands fairly and finally convicted, especially when, as here, he already has had a fair opportunity to present his federal claims to a federal forum. Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless post-conviction collateral attacks. To the contrary, a final judgement commands respect." [Emphasis added].

The Frady court further explained:

> "It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment. The reasons for narrowly limiting the grounds for collateral attack on final judgments are well known and basic to our adversary system of justice. [quoting] United States v. Addonizio, 442 U.S. 178, 184, 99 S.Ct. 2235, 2239, 60 L.Ed.2d 805 (1979) (footnotes omitted)."
>
> * * *
>
> "The burden of demonstrating that an erroneous instruction was so prejudicial

> that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. [quoting] Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203 (1977)." [Emphasis supplied].

See, also, Chambers v. Maroney, 399 U.S. 42, at 53-54, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970) (even if counsel was ineffective, an examination of the whole record reveals that the errors had no effect upon the outcome of the cause); Darcy v. Handy, 351 U.S. 454 (1956) (merely that counsel did not complete a list of things he could do does not establish error in the constitutional sense; the record reflects no actual prejudice).

In Darcy v. Handy, this Court explained the requirement that a defendant show actual prejudice:

> "While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.'" [Emphasis added; citations omitted].
>
> 351 U.S. at 462.

This Court in Frady in fact explained that a habeas corpus petitioner has the burden to show actual prejudice

to the outcome of his cause from the error he asserts:

> "Contrary to Frady's suggestion, he must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." [Emphasis supplied by the Court].
>
> 102 S.Ct. at 1596.

The burden should normally lie upon the person pressing the claim. An exception may be made when the other party has sole access to the facts. As Justice Holmes noted in Casey v. United States, 276 U.S. 413, 418 (1928):

> "It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government."

If the State were required to prove that defense counsel was adequate, there would be a strong motivation to oversee the decisions and activities of defense counsel in order to protect convictions. To do so would invariably place the prosecutor in the role of probing the confidential relationship between a criminal defendant and his attorney. See United States v. DeCoster, 624 F.2d 196, 227-229 (D.C. Cir. 1979). For these reasons the burden of establishing ineffective assistance of counsel has appropriately been placed upon the petitioner.

For cases placing the burden on petitioner to prove prejudice See United States v. Swinehart, 617 F.2d 336, 340

(3rd Cir. 1980); Parton v. Wyrick, 614 F.2d 154, 158 (8th Cir. 1980); Kibert v. Blankenship, 611 F.2d 520, 526 (4th Cir. 1979), cert. denied, 446 U.S. 911 (1980), reh. denied, 446 U.S. 993 (1980); Cooper v. Fitzharris, 586 F.2d 1325, 1331 (9th Cir. en banc 1978); Matthews v. United States, 518 F.2d 1245 (7th Cir. 1975); United States v. Baca, 451 F.2d 1112 (10th Cir. 1971).

Petitioner continues to rely upon Washington v. Strickland, 673 F.2d 879 (5th Cir. 1982). As previously pointed out, this case has been scheduled for rehearing en banc and consequently the opinion has no precedential value. See United States v. Michael, supra.

ARGUMENT III

THE PETITIONER DID NOT BEAR HIS BURDEN OF ESTABLISHING PREJUDICE.

Petitioner's argument hinges upon his assertion that by his counsel's failure to talk to Dr. Dimitris he has been deprived of available mitigating evidence. Even if it is assumed that counsel had some duty to call Dr. Dimitris, petitioner has failed to establish prejudice from any such

failure. Petitioner assumes that the report of Dr. Dimitris of July 14, 1980, raises a substantial issue of fact concerning the presence of mitigating mental abnormalities at the time of the offenses.

Respondent submits that petitioner's position cannot withstand scrutiny. Dr. Dimitris' opinion is essentially that if the facts of the case are as stated by petitioner to Investigator K. E. Collins on September 28, 1978, then he finds no mitigating mental abnormalities. If on the other hand the facts are those which petitioner presented in June 1980, there would exist mitigating mental abnormalities due to reported heavy intoxication.

There can be no question about which statement of petitioner comprises the facts of this case. Shortly after the crimes petitioner gave several detailed statements describing his participation in the crimes. The voluntariness of these statements was contested during a motion to suppress at which time petitioner testified. Petitioner did not then and did not during the habeas hearing conducted on April 25, 1980, deny the truthfulness of the statements which he gave in 1978. The trial court has found that petitioner's statements in 1978 were voluntarily and intelligently given. The Supreme Court of Virginia has credited these 1978 statements as stating the facts. See Mason v. Commonwealth, 219 Va. at 1094. The petitioner never gave his counsel any reason to

believe he was at best "a hair's breath" distant from unconsciousness at the time of the offenses. (T. p. 77). To the contrary, petitioner's explicit description is consistent with a person who is cold and calculating and is inconsistent with the actions of a person bordering on unconsciousness. (T. p. 77).

The physical facts found at the scene of the crimes corroborated petitioner's statements given in 1978. Petitioner said he went into the house of Mrs. Hand and told her to undress. Petitioner said she went into the bedroom to comply. Mrs. Hand's clothes were found in the bedroom. Petitioner stated that he had hit Mrs. Hand several times with an ax. An ax was found at the scene and laboratory examination revealed hair samples consistent with Mrs. Hand's hair. Petitioner stated he had introduced the ax into Mrs. Hand's rectum. The physical examination showed her anus opening was dilated and slightly patulous. Petitioner stated he started the fire under the chair and the arson examiner confirmed this to be the point of origin of the fire. Most importantly petitioner stated he set the house on fire to keep down the evidence. (T. 9/28/78 p. 59), and that he went back into the burning house to recover a bag which he believe contained his fingerprints. (T. 9/28/78 pp. 64, 65). In this regard a portion of Dr. Lee's testimony is pertinent:

"For example, I recall a statement where he had access to traveler's checks where he was looking for money. It just doesn't register that a person who is mentally upset and doing hideous things would discriminate against taking traveler's checks because they looked like money." (T. p. 115).

Such actions as these are entirely inconsistent with a person bordering upon unconsciousness.

It is further to be noted and of importance that part of Dr. Dimitris' opinion expressed in his letter of July 14, 1980, is based upon petitioner's uncorroborated self-serving statements of his ingestion of drugs and alcohol. When petitioner was examined by Dr. Dimitris in 1978 he specifically advised Dr. Dimitris that at the time of the offenses he was having no problem with drugs or alcohol. (T. pp. 21, 26). Conveniently, however, in 1980 the petitioner has decided that he had a problem with drugs and alcohol at the time of the offenses. Dr. Lee testified that had the attorneys called him he would have told them that in light of his test findings and petitioner's statements they would have to develop considerable independent confirming evidence that petitioner was not in possession of adequate judgment to appreciate the nature of his acts. (T. p. 99). The record establishes without contradiction that although counsel tried to find corroboration they were unsuccessful.

Petitioner argues that the responsibility for determining which of Dr. Dimitris' opinions is correct would have rested on the fact finder. Respondent submits that the

habeas court had the responsibility to make such judgment. In Proffitt v. United States, 582 F.2d 854 (4th Cir. 1978), the court held that the district court in a federal habeas corpus proceeding had the responsibility of determining whether there existed a substantial question of criminal responsibility. The factual scenario in Proffitt is similar to the claim being made in the present case.

From the facts in this case it can only be concluded that the statements given by petitioner to Investigator K. E. Collins on September 28, 1978, are true, accurate and are the facts of this case. There is no question, substantial or otherwise, about the existence of mitigating mental abnormalities. Dr. Dimitris' opinion firmly concludes that petitioner was not suffering from any mitigating mental abnormalities at the time of his crimes based upon the statements he made in 1978. This being so, petitioner has failed to carry his burden of establishing prejudice from any omission by counsel.

For the reasons previously set out there can be only one factual circumstance in this case and that arises from petitioner's statements in 1978. On these facts no court could or would hold that petitioner was suffering from any mitigating mental abnormalities at the time of his offenses, and any failure to have petitioner examined is harmless beyond a reasonable doubt.

CONCLUSION

For the reasons set forth, respondent asserts that the Petition for Habeas Corpus was properly denied, the Court's finding that petitioner received effective assistance of counsel is clearly supported by the record, and the Petition for a Writ of Certiorari should be denied.

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CERTIFICATE OF SERVICE

I, James E. Kulp, a member of the bar of this Court, do certify that on August 19, 1982, I caused this Brief In Opposition to be deposited in a United States Post Office or mailbox, first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, pursuant to Rule 28.2.

I further certify that a copy of this Brief In Opposition was mailed, first class postage prepaid, to F. Guthrie Gordon, III, 409 Park Street, Charlottesville, Virginia 22901, counsel for petitioner.

James E. Kulp
Senior Assistant Attorney General

VIRGINIA

CITY OF RICHMOND, to-wit:

The foregoing instrument was subscribed and sworn before me on this 19th day of August, 1982, by James E. Kulp.

Janet I. Johnson
Notary Public

My commission expires: My Commission Expires October 4, 1982

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